83-872

NO.

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1983

PETER F. CROSBY,
Petitioner

v.

UNITED STATES,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Must the District Court under Rule 11 of the Federal Rules of Criminal Procedure conduct a searching inquiry at a change of plea hearing when a defendant indicates that he has been threatened or made a promise apart from the disclosed plea agreement, so that the record of that hearing discloses whether or not the plea was voluntary?

2. Can a Court of Appeals on direct appeal apply an abuse of discretion standard and conclude that Rule 11 was complied with, even though the record of the change of plea hearing clearly fails to address the defendant's claim at that hearing that he was threatened by the F.B.I. and made inducement apart from the plea agreement by the Custom's Department and the government?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit affirming the petitioner, Peter Crosby's conviction after a plea of guilty in the United States District Court for the District of Massachusetts is reported as United States v. Crosby, 714 F.2d 185 (1st Cir. 1983). It is set out in the Appendix, infra., pp. A-2 to A-34.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on August 2, 1983. The order denying the timely filed Petition for Rehearing Or Rehearing En Banc was entered on September 9, 1983. This petition has been filed within sixty days of that date, as required by Rule 20 of the Rules of the Supreme Court of the United States. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

This case involves the Fifth Amendment and Rule 11(d) of the Federal Rules of Criminal Procedure. The Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Rule 11(d) of the Federal Rules of Criminal Procedure provides:

> The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney.

STATEMENT OF THE CASE

On April 28, 1982, a grand jury sitting in the District of Massachusetts returned a 25 count indictment against Peter Crosby and three co-defendants. Crosby was named in 16 of the counts, alleging conspiracy, interstate transportation of stolen property, wire fraud, mail fraud, obstruction of justice, and perjury. Trial commenced on October 21, 1982, before a jury and the Honorable District Judge Zobel. After eleven days of trial, and before the government had rested, Crosby offered to change his plea on November 5, 1982.

On that day, a change of plea hearing was held. At that hearing, the District Court asked the government to outline its proposal; that proposal was a recommendation on Count One that would not exceed four years, and dismissal of

the other counts. Defense counsel, Norman Buntaine, informed the court that there was a "reason why the United States Attorney's Office has permitted this plea to remain open in terms of their recommendation". Defense counsel further stated that there was need for time between the date of the plea and the date of sentencing in order to cause the sentencing to be the most enlightened that it could be in terms of "any recommendation that [the Court] would receive from any responsible party".

The defendant said that he had performed a dangerous service for his country, and that in order to completely effectuate that service, he would need permission to travel. He insisted that if he was impeded from completing his service, he would not plead. Defense counsel then said that this need was

discussed with the government, and that the government had indicated that it would not oppose a reasonable request for an adjournment. The District Court indicated the defendant would have a reasonable time, and then proceeded to inquire of the defendant personally.

After a discussion of the indictment and the defendant's constitutional rights, the following colloquy occurred:

> THE COURT: Has anyone in any way threatened you or coerced you to enter this plea?
>
> MR. CROSBY: Yes. They have coerced me, the FBI.
>
> THE COURT: In what way?
>
> MR. CROSBY: By tapping my telephone in New York City; by absconding with my address book and making hundreds of copies and sending it all over the world, to every FBI jurisdiction in the United States; calling everybody in the address book, 400 people approximately, and intimdating and denigrating me, and threatening people that they're going to be in serious trouble if they have

any further dealing with me, I would say is tremendous coercion, unbelievable corercion.

So that's the answer to that question.

THE COURT: You understand that if you feel that you are offering the plea under threat or coercion, I cannot accept it?

MR. BUNTAINE: Your Honor, I think that Mr. --

MR. CROSBY: I gave an honest answer.

MR. BUNTAINE: Mr. Crosby is giving an honest answer in terms of what has occurred to him, and I think he's giving an emotional answer. I think that your Honor would be --could be advised to tell Mr. Crosby the legal definition of coercion in this courtroom; that is, I think your Honor is inquiring as to whether this Court or any of its personnel, and not certainly the flatfoot on the street, has coerced Mr. Crosby.

THE COURT: Has anyone in this Court threatened you or coerced you?

MR. CROSBY: Yes. I've been threatened by --

MR. BUNTAINE: No.

MR. CROSBY: -- FBI agents --

THE COURT: By any --

MR. CROSBY: With half a dozen more indictments.

THE COURT: -- by the Court? Has the Court in any way threatened you or coerced you?

MR. CROSBY: You mean your Honor? Yourself?

THE COURT: Yes.

MR. CROSBY: No. I wouldn't say you have you. No.

MR. BUNTAINE: And, furthermore, I don't think I have. And I don't think Mr. Stearns has.

MR. CROSBY: Well, Mr. Stearns has not either.

THE COURT: Has Mr. Stearns or has Mr. Buntaine threatened you to enter a plea?

MR. CROSBY: Occasionally he threatens to quit on me, but that's not a threat (laughing).

I would say no.

The Court then went on to recite the plea agreement as it understood it, and asked the defendant if there were any promises beyond that. After defense counsel made some remarks about the meaning of a recommendation not to exceed four years, the defendant said there were additional promises. The first additional promise discussed was that, should related charges be brought, the defendant would be permitted to plead under Rule 20. The government agreed that this promise had been made.

The following colloquy then occurred:

> THE COURT: What's the next one Mr. Crosby?
>
> MR. CROSBY: The next point is that there would be no amount of loss specified to the Probation Department.
>
> The other point is that in order to implement the thought encompassed in a two page letter, which I would like to

present to the Court, my travel rights would be restored, and the bail would remain the same, and I would have my passport in order to go to Guatemala to implement what your Honor would see in this two page letter, the problem that exists in this letter.[1]

And I think that's the total.

THE COURT: Well, as to the last, the Government can only make recommendations, and the ultimate decision is mine. Correct?

MR. STEARNS: That's -- I explained to Mr. Crosby that this would be between him and the Court. I have said that the Government will not ask for any increase or revocation of bail.

THE COURT: All right.

The government next gave its summary of the evidence supporting Count One. The Court then discussed with the defendant the factual basis for the plea,

[1]This letter was taken as an exhibit, and is reproduced in the Appendix at A-37 to A-43.

eventually calling a side bar conference with counsel, since the defendant had not admitted to violating any law. After giving defense counsel an opportunity to confer with the defendant, the Court began the factual discussion again with the same result. After a second conference with his counsel, the defendant admitted that he knew that funds were not in the bank for checks discussed in the indictment.

The District Court then accepted the defendant's guilty plea to Count One. January 4, 1983 was set for disposition, and Crosby remained free on bail.

On January 4, 1983, defense counsel filed on Crosby's behalf a motion to withdraw his guilty plea. The District Court heard oral argument on the motion. Defense counsel stated that the bargain struck in the case included a discussion

of the "Guatemalan" special service to be performed by Crosby, and that inducements were given to Crosby prior to his change of plea. After the plea, the government refused to cooperate. Defense counsel added that a full inquiry had to be made about the circumstances surrounding the plea, and that it was inappropriate for him to continue to represent Crosby since he would have to be a witness. The prosecutor denied that any special service was part of the plea discussion. The District Court denied the motion. The government recommended a sentence of four years imprisonment, and the District Court accepted that recommendation. The remaining counts were dismissed.

Crosby timely filed a notice of appeal. In support of a motion for bail pending appeal, Attorney Norman Buntaine, filed an affidavit in which he swore that

Agent Crotty of the United States Customs Service had told him he would make a recommendation to the United States Attorney on Crosby's behalf, should Crosby's mission regarding Guatemala prove successful. Buntaine also swore that the Assistant United States Attorney knew of the mission, and had stated that he would take it into account in his sentencing recommendation, if it proved successful.

The First Circuit affirmed the judgment of conviction, holding that the guilty plea was voluntary.

REASONS FOR GRANTING THE WRIT

Rule 11 of the Federal Rules of Criminal Procedure has two basic purposes, (1) to assist the district judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntary, and (2) to produce a complete record at the time the plea is entered of the factors relevant to the voluntariness determination. McCarthy v. United States, 394 U.S. 459, 465 (1969). On direct appeal, non-compliance with other than the mere formal requirements of Rule 11 is reversible error. See McCarthy v. United States, supra, at 464, n.9; United States v. Timmreck, 441 U.S. 780, 785 (1979).

The decision of the First Circuit in the case at bar far departs from these important principles, and is in direct conflict with the First Circuit's own

earlier decision in Mack v. United States, 635 F.2d 20 (1980).

The requirement of Rule 11(d) that the district court address the defendant personally and determine that the plea is not the result of threats or promises apart from the plea agreement is at the heart of Rule 11. Mack v. United States, supra, at 23, 25; United States v. Fels, 599 F.2d 142, 149 (7th Cir. 1979); United States v. Cammissano, 599 F.2d 851, 856 (8th Cir. 1979). Should the defendant, when addressed by the judge, give any serious indication that the plea is a result of force or threats or of promises apart from a plea agreement, the Fifth Amendment is immediately and directly implicated, and a most searching inquiry into these matters must follow. United States v. Dayton, 604 F.2d 931, 938 (5th Cir. 1979), cert. denied, 445 U.S. 904

(1980); Mack v. United States, supra, at 24.

Here, the petitioner at his plea hearing said that he had been threatened by the F.B.I. The doubts and questions raised by this statement were not even addressed by the District Court, let alone resolved.

Here, the petitioner at his plea hearing said that he had performed a dangerous service for his country, and that, in order to effectuate that service, he would need permission to travel. He insisted that if he was impeded from completing his service, he would not plead. Defense counsel then said that this need was discussed with the government, and that the government had indicated it would not oppose a reasonable request for an adjournment. A letter describing the dangerous service,

requesting consideration for the service, and seeking a reply by November 5, 1982 (the date of the change of plea hearing) was taken as an exhibit by the District Court at the change of plea hearing.

It is clear that there was thus a serious indication that a promise apart from the plea bargain had been made to the petitioner. In its Order of March 4, 1983, denying bail pending appeal, the District Court, in effect, concedes this point. "Insofar as defendant sought to interject into the proceedings alleged secret agreements with customs agents to assist in uncovering Guatemalan gun running, I explicitly excluded them from consideration." Rather than attempt to ignore these questions or exclude them from consideration, under Rule 11, the District Court should have attempted to flush them out and resolve them at the

change of plea hearing.

In upholding the petitioner's conviction in spite of the District Court's failure to conduct a proper inquiry on the qeustion of threats and promises, the First Circuit applied the wrong standard, went outside the transcript of the change of plea hearing, and engaged in resolution of factual conflict by fiat.

The First Circuit applied the standard of abuse of discretion. See A-22; A-34. McCarthy demands on direct appeal full compliance with all but the mere formal requirements of Rule 11. The District Court has no discretion to uphold a plea which fails to comport with Rule 11, and the fact that the petitioner moved to withdraw his guilty plea prior to sentencing cannot affect that principle.

Secondly, the First Circuit relied on the petitioner's "failure to do anything" after the change of plea hearing as evidence that no promise had actually been made. See A-29. This attempt to go beyond the transcript puts the First Circuit in direct conflict with the Fifth Circuit, see United States v. Coronado, 554 F.2d 166, 170, n.5 (1977), cert. denied, 434 U.S. 870 (1977), and in direct conflict with the McCarthy principle that the plea hearing produce a complete record of compliance with Rule 11.

Finally, the First Circuit misconstrued its function in reviewing a change of plea hearing. The record of the change of plea hearing must assure a subsequent reader that the plea was voluntary. See United States v. Coronado, supra, at 173 [emphasis supplied].

Whether or not the petitioner was *in fact* threatened by the F.B.I. or made promises by Customs is not the issue on direct appeal. That the First Circuit is able to resolve this factual issue by fiat, holding that there was no threat nor promise, despite clear contrary indications in the record, does not change the nature of the legal problem.[2] It is the failure to

[2] In *Mack v. United States*, *supra*, the First Circuit did not require Mack to prove that his claims that he was drugged and beaten at the Medical Center for Federal Prisoners in Missouri were true or even inherently likely. Instead, on the grounds that no searching inquiry was made on the record, the First Circuit reversed his conviction. The petitioner here asks that the First Circuit apply the same principled analysis to him. Simple follow up questions would have resolved the voluntariness issue at Crosby's change of plea hearing. Did Customs and/or the Assistant United States Attorney make you any promises concerning the Guatemalan mission? If so, what were they? When and how did the F.B.I. threaten you with further indictments? If, as the First Circuit now claims, there were no threats or promises, this simple further inquiry, as required by Rule 11, would have made that clear.

conduct the proper Rule 11 inquiry that necessitates reversal on direct appeal. See United States v. Fels, supra, at 149. The district court must resolve all doubts and questions on the record at the time the plea is entered. This was not done in the case at bar.

CONCLUSION

For the foregoing reasons, the writ should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 83-1040

UNITED STATES,
Appellee

v.

PETER F. CROSBY,
Defendant-Appellant

JUDGMENT

Entered: August 2, 1983

This cause came to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged, and decreed as follows: The judgment of the district court is affirmed.

By the Court:

Francis P. Scigliano
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 83-1040

UNITED STATES,
Appellee

v.

PETER F. CROSBY,
Defendant-Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Rya W. Zobel, U.S. District Judge]

Before

McGowan,* Senior Circuit Judge,
Bownes, Circuit Judge
and Skinner,** District Judge

Robert Sheketoff, with whom Zalkind & Sheketoff was on brief, for appellant.

Richard G. Stearns, Assistant United States Attorney, with whom William F. Weld, United States Attorney, was on brief, for appellee.

August 2, 1983

* Of the District of Columbia Circuit, sitting by designation.

** Of the District of Massachusetts, sitting by designation.

BOWNES, Circuit Judge. This is an appeal from the denial of defendant-appellant's motion to withdraw his guilty plea. There are two issues:

1. Whether, under the circumstances, the district court conducted a sufficient inquiry to determine that the plea was voluntary; and

2. Whether the district court adequately informed defendant of the nature of the charge against him and correctly determined that he understood it.

The Pre-Trial Facts

The guilty plea issues must be viewed against he background of the district court's pre-trial attempt to ensure that defendant was represented by counsel at the trial. A twenty-five count secret indictment was returned against defendant, Peter Crosby, and

three co-defendants on April 28, 1982. Defendant was charged in sixteen of the counts with conspiracy, interstate transportation of stolen property, wire fraud, mail fraud, obstruction of justice, and perjury.

After being arraigned, defendant was released on bail subject to certain travel restrictions. In July, the case was given a trial date of September 20, 1982. On August 3, 1982, defendant's counsel, Ivan Fisher, moved to withdraw stating, "I have experienced a persistent and irremedial failure in communication between my client and me which has rendered it impossible for me to represent Mr. Crosby effectively." The motion also stated that Fisher and defendant had failed to agree on attorney fees. At the hearing on the motion on August 10, defendant told the court that

he was retaining the Boston firm of Warner and Stackpole, that "the attorney who has consented to handle my case will return to the City on Monday", and that he had a group of three attorneys there which could give him adequate representation. The court granted the withdrawal motion and warned defendant that trial was set for September and "you should advise your new attorneys they had better get ready immediately" because no continuances would be granted. At no time did defendant advise the court that Warner and Stackpole were being retained solely to represent him relative to his bail conditions.

After the court learned that Warner and Stackpole had filed only a special appearance, a hearing was held on September 14 on the question of defendant's trial representation. The

court informed defendant that the case would commence within a month after September 20 and defendant "must have counsel no later than the end of this week, ... because I will not grant a further continuance for counsel to get ready if you don't have counsel by the end of this week". Upon inquiry, the defendant stated that he understood what the court had said. On September 15, the case was noticed for trial on October 12.

A further hearing was held on September 28. At that hearing, Attorney Stephen Gordon of Worcester appeared, but the defendant informed the court that he was appearing pro se and that Gordon was present "as a consultant only". The court rehearsed what had already taken place relative to defendant's representation and ended by stating, "I urge you once again to engage counsel forthwith

because whether or not you have a lawyer this trial will start on October 12th at 9:00 a.m. as scheduled." Defendant filed a motion for a change in his bail travel conditions; the court said that he could file the motion, but that it would not consider it until defendant had retained counsel.

On October 12, the day of the trial, Norman Buntaine appeared as trial counsel for defendant. He informed the court that "I am not prepared to file my notice of appearance if, in fact, the jury selection begins on this date and trial would begin on this date." He then stated, "I came here expecting to ask for a six-week adjournment." The court indicated that it would grant a continuance,[1] but would not discuss its

[1]Counsel for one of the other defendants had also requested a continuance.

length until after Buntaine filed a written appearance for the defendant. Buntaine filed his appearance; an eight-day delay in the start of the trial was granted.

We fully agree with the district court's finding that defendant's representation of due diligence in trying to obtain counsel was not believable. Indeed, the facts strongly sugest that defendant deliberately procrastinated in obtaining counsel so as to force a delay in the start of the trial.

The Guilty Plea

Defendant's background and experience is pertinent. At the time of the trial, he was in his early sixties. He had a college education and served under General Patton in World War II. Most significantly he had, by his own admis-

sion, been in federal court over seventy times. His prior record showed two prior convictions of conspiracy and fraud which involved the looting of one corporation and the aborted looting of another, one conviction of conspiracy and embezzlement, which was perpetrated while defendant was on parole, and an attempted forgery with an eighty-year old woman as the intended victim. The convictions were the result of guilty pleas.

Defendant and two co-defendants were tried together. After eleven days of trial, the court was notified that defendant wished to enter a guilty plea. By this time the government had presented the main part of its case against the defendant. At least a dozen witnesses had testified, and more than eighty exhibits had been marked in evidence. The chief government witness had been on

the stand for six days of direct and cross-examination.

The hearing on the acceptance of the guilty plea covers forty-nine pages in the record. The plea bargain was discussed and explained at length (11 pages of transcript); the defendant, his counsel, the prosecutor, and the court all took part in the discussion. During the colloquy on the terms of the plea bargain, the court twice told the defendant and his counsel that if defendant was unwilling to go along with the proposed plea bargain, the trial would proceed. At no time did defendant or his counsel indicate that they wanted the trial to resume. As a result of the extended discussion, the prosecutor modified the plea bargain to meet certain objections of the defendant. Finally, the court said, "Mr. Crosby, I understand

that you are now offering to plead guilty to one count, only, of this multi-count indictment, namely, Count One, which charges conspiracy, is that correct?" The defendant replied, "Yes, your Honor." The court then stated:

> Before I can accept the plea, I must ask you a series of questions and explain certain things to you to make sure that you understand the nature of the charge to which you are pleading, the maximum penalty that the Statute provides, t, make sure that you're pleading voluntarily, and to make sure that you understand what rights you are waiving by pleading guilty and, also that you, in fact, are guilty.

In response to the court's inquiry, the defendant said, "I understand what you just said, yes, your Honor." Defense counsel then interrupted the questioning to request that defendant be given a six months delay between the acceptance of the plea and sentencing. The court pointed out there would be a delay for

preparation of the pre-sentence report, but stated emphatically that it would not agree to a six months delay. Defendant insisted on making the following statement. "I performed a very dangerous, expensive service for this country. And I think if you knew the facts, I would be allowed to discuss this on the record in chambers. And I have a letter to verify this." The letter was submitted to the court and is part of the record.

The court refused to conduct any of the proceedings in chambers. Defendant stated that in order to effectuate "this service" he needed to travel and then, presumably referring to his bail travel restrictions, said that if he was going to be "imprisoned on the Island of Manhattan, where I can't perform, I'm withdrawing, and I will not plead, and I will go to the end, and I'll fight ten

trials." Defense counsel interjected that he had discussed this with the prosecutor who had said that he would not oppose a reasonable request for adjournment and might well request it. The court stated that it had no problem with that and started to explain that defendant would have "a reasonable time between the -- " when it was interrupted by defendant who asked "what's wrong with six months". After another interjection by defendant, "I'll last six more months. You'll be able to sentence me," the following exchange took place.

> THE COURT: We will either proceed to the plea right now, in accordance with the normal manner of taking a plea, or we will proceed with the trial.
>
> Are you ready to proceed with the taking of a plea, Mr. Crosby?
>
> MR. CROSBY: Yes, I am, your Honor.

The court then proceeded to question the defendant. In response to an inquiry as to whether he had read and understood the indictment, the defendant said he had read it, but did not understand it. This was followed by a statement that he could read, write, and understand the English language, and that he understood the court. The court then went on to carefully explain the constitutional rights defendant was waiving by pleading guilty. Defendant stated clearly in response to specific questions that he understood fully the consequences of a guilty plea. The substance of Count One of the indictment, to which the defendant was pleading, was explained, and the maximum penalty it carried was stated.

When the defendant was asked if anyone threatened or coerced him to enter the plea, he said the FBI had coerced

him. The court then asked, "In what way?" The defendant replied as follows:

> By tapping my telephones in New York City; by absconding with my address book and making hundreds of copies and sending it all over the world, to every FBI jurisdiction in the United States; calling everybody in the address book, 400 people approximately, and intimidating and denigrating me, and threatening people that they're going to be in serious trouble if they have any further dealings with me, I would say is tremendous coercion, unbelievable coercion.

The court then asked defendant if he understood that it could not accept a coerced plea. Defense counsel suggested that the court advise defendant that it was inquiring "as to whether this Court or any of its personnel ... has coerced Mr. Crosby". After defendant stated that FBI agents had threatened him with a half dozen more indictments, the court asked defendant by separate questions if it, or either of the attorneys, had coerced him

to enter a plea. The answer was negative in each instance.

The terms of the plea bargain were outlined and explained again. Defendant stated that the government had made other promises. The court asked him to state them. He said one was "that I could be sentenced under Rule 20. And if they intend to break up this bank problem in other regions of the United States, that that [sic] would be covered by a Rule 20 plea." The prosecutor then stated that defendant would be permitted to plead under Rule 20 to any charges related to anything mentioned in the conspiracy count, if an indictment were brought. The next promise alleged by defendant was "that there would be no amount of loss

specified to the Probation Department".[2]

The following colloquy then ensued.

> MR. CROSBY: The other point is that in order to implement the thought encompassed in a two-page letter, which I would like to present to the Court, my travel rights would be restored and the bail would remain the same, and I would have my passport in order to go to Guatemala to implement what your Honor would see in this two-page letter.
>
> And I think that's the total.
>
> THE COURT: Well, as to the last, the Government can only make recommendations and the ultimate decision is mine. Correct?
>
> MR. STEARNS: That's -- I explained that to Mr. Crosby, that this would be between him and the Court. I have said that the Government will not ask for any increase or revocation of bail.

[2]It is uncontraverted that no one had suffered any financial loss as a result of the conspiracy. As the district court pointed out at the sentencing hearing, however, this was because the scheme failed, not because of any course of conduct by defendant.

THE COURT: All right.

MR. BUNTAINE: And today I intend to ask the Court to amend those provisions.

THE COURT: Well, we'll come to that.

MR. BUNTAINE: Thank you.

THE COURT: We're not there yet.

MR. BUNTAINE: Thank you.

After restating the plea bargain as finally agreed to by defendant, the court had the prosecutor summarize the evidence on Count One, most of which had already been presented at trial.

Defendant then made a lengthy ambiguous statement about his role in the conspiracy. After a series of specific questions by the court as to what defendant had done and to which defendant gave evasive or noncommittal answers, defendant admitted that he knew there were no funds to cover a check in the

amount of $8,000 issued to Simmons College. The court then stated that defendant's guilty plea would be accepted. Defendant was asked if he wished to change his plea to Count One. He stated that he did. When asked how he pleaded to Count One, and being assured that it was the conspiracy count, defendant stated, "I plead guilty to that count."[3] Bail conditions were discussed; the court then set different and more liberal travel restrictions than had been in effect. Disposition was set for January 4, 1983, two months hence.

On January 4, 1983, Attorney Buntaine moved to withdraw the guilty plea, which was denied. Defendant and his attorney were given an opportunity to

[3]The two co-defendants pleaded guilty two days later.

read the pre-sentence report and comment on it. Attorney Buntaine's plea for leniency was as cogent as could be in light of the facts. In his pre-sentence statement, defendant alleged that he had been prevented from performing the service for the government, that this was a contravention of the inducement that caused him to plead in the first place, and that was why he was asking to withdraw his plea. The court sentenced the defendant to four years imprisonment, which was the term recommended by the government and specifically referred to in the plea bargain.

Attorney Buntaine withdrew as defendant's counsel. He subsequently filed an affidavit stating, inter alia, that he was unable to render fully effective assistance as counsel becuase of inadequate time to prepare.

The Law

The first and basic legal principle is that "[a] defendant possesses no absolute right to withdraw a guilty plea even prior to the imposition of sentence". United States v. Kobrosky, No. 83-1304, slip op. at 11 (1st Cir. July 5, 1983); Nunez Cordero v. United States, 533 F.2d 723, 726-727 (1st Cir. 1976). This, however, is tempered by the rule that before a district court can deny a motion to withdraw a guilty plea, it must decide whether it would be "fair and just" to do so under the circumstances of the case before it. Kercheval v. United States, 274 U.S. 220, 224 (1927). Our standard of review has been well stated as follows:

> The standard guiding the trial court in deciding a motion to withdraw a plea of guilty before sentence is simply whether or not "fair and just"

> reason has been advanced, see Kercheval v. United States, 274 U.S. 220, 224, 47 S.Ct. 582, 583, 71 L.Ed 1009, 1012 (1927). It should be liberally alowed. The standard guiding the reviewing court is whether the district court has abused its discretion, see, e.g., United States v. Barker, 514 F.2d 208, 220 (D.C. Cir. 1975), as to which an appellant carries the burden. United States v. Webster, 468 F.2d 769 (9th Cir. 1972); United States v. Lombardozzi, 436 F.2d 878 (2d Cir. 1971).

Nunez Cordero v. United States, 533 F.2d at 725.

A crucial consideration in most guilty plea revocation cases is whether the plea was made voluntarily with full understanding of the charges. Brady v. United States, 397 U.S. 742, 748 (1970); McCarthy v. United States, 394 U.S. 459, 465 (1969). "At the core of Fed. R. Crim. P. 11, is the policy that a court should not accept a guilty plea unless it determines that the plea is voluntary and

the defendant understands the nature of the changes." Mack v. United States, 635 F.2d 20, 23 (1st Cir. 1980).

Defendant argues that his guilty plea was not voluntary for three reasons, which we discuss seriatim. He first asserts that the court failed to conduct a sufficient inquiry into his claim of coercion. Defendant's claim of coercion by the FBI made no sense, and we find no merit in this argument. It was obvious that the FBI had nothing to do with defendant's decision to plead guilty. Defendant's attorney realized this because immediately after defendant's statement about the FBI, Attorney Buntaine suggested that the court inquire whether the court or any of its personnel had coerced the defendant. Moreover, the record shows that it was defendant who made the initial decision to plead guilty.

[Lobby Conference]

THE COURT: What is the story?

I received a cryptic message.

MR. BUNTAINE: Judge, my client, Mr. Crosby, has indicated to me that he would like to enter a plea to this Court of guilty to one of the charges on the indictment.

He actually has a letter that he's addressed and would like to have the Court take. I don't know of the appropriateness of the letter, but I can ceratinly speak for the record as to any questions your Honor might have. I've just had preliminary discusion with Mr. Crosby about this. He and I still haven't ironed out all the details.

The letter referred to concerned defendant's self-styled service for the government and will be discussed later. It had nothing to do with FBI coercion. We think that under the circumstances, the court's coercion inquiry was adequate. This is a far cry from Mack v. United States, 630 F.2d 20, on which

defendat relies. In Mack the defendant told the court that he had been harrassed, beaten, and drugged by the staff at the Medical Center for Federal Prisoners in Springfield, Missouri. He then stated, "I am being pressured into making this plea. I am not doing it of my own free will." Id. at 23. Here, the defendant informed his lawyer that he wanted to plead guilty, and there was never any suggestion that his decision was the result of coercion in the accepted sense of the word.

Defendant's second attack on the voluntariness of his plea is based on the court's failure to inquire into the existence of some promise other than the disclosed plea bargain that might have prompted the guilty plea. The only record evidence as to what prompted the guilty plea came from defendant himself.

He stated during the plea hearing that he was in the process of performing a dangerous service for the United States, and that if he was not given the time to complete it between the acceptance of his plea and sentencing, he would not plead guilty. Defense counsel told the court that the prosecutor would not oppose a reasonable continuance of sentencing. The court set the sentencing date eight weeks later. The only objection to the sentencing date, January 4, 1983, was by defense counsel on the ground that it interferred with his Christmas holiday. No motion was filed by defendant between the plea hearing and the date set for sentencing for a continuance so that the alleged dangerous service could be completed.

The only thing clear about the letter which supposedly describes the

dangerous service is that it is entirely self-serving. It was written by the defendant to James Crotty, Special Agent, United States Customs Department, Washington, D.C. It is titled, "Re: Unlicensed arms and ammunition to be delivered by airplane in the States of North Carolina, U.S.A." The letter in a rambling and disjointed manner suggests that in return "for financing the expenditures needed to result in the apprehension of these unlicensed criminal co-conspirators" [those who were to deliver the arms and ammunition to North Carolina], I desire the following consideration concerning the matter for which I am presently on trial in the Federal Court, Boston, Massachusetts." The letter then goes on to state what defendant expected. The letter concludes, "I would appreciate an incisive, conclusive appraisal, opin-

ion, and recommendation by November 5th." This was the date of the guilty plea.

We cannot fault the district court for not questioning defendant about a promise that had not been made. The question is whether it was reasonable, in an objective sense, for the defendant to believe that if he did certain things, the government would make specific sentencing recommendations.

> If subjective impressions, however irrational and unfounded, were enough, any defendant could claim them and thus secure tactical advantages by pleading guilty and delaying his withdrawal motion to a point where retrial would be onerous or impossible for the Government. In our view, the proper question in this case is not whether appellants entertaining the erronerous belief that silence was their duty, but whether this belief was, in an objective sense, reasonable in the circumstances.

United States v. Barker, 514 F.2d 208, 224 (D.C. Cir. 1975) (citations omitted).

We conclude that defendant's belief that the government would intervene in his behalf if he performed this self-described and self-imposed service was unreasonable and unfounded. Defendant and his counsel had eight weeks between the time of the plea hearing and the date of sentencing to contact Crotty and obtain an affidavit from him or move that the court order Crotty to appear at the sentencing hearing. The failure to do anything but allege a bizzare undertaking speaks for itself.

The third attack on the voluntariness of the plea is at least easy to understand. Defendant argues that a guilty plea is not voluntary if it is entered because defense counsel is not prepared for trial, and the district court failed to adequately inquire about this. The facts demolish this argument.

There is not the slightest suggestion in the record that that guilty plea was in any way prompted by the state of the trial preparation of defendant's attorney. It is true that in his affidavit filed in February 1983, after his withdrawal from the case, Attorney Buntaine did state ne was unable to render fully effective assistance of counsel because of inadequate time to prepare. But it is only on appeal that it is suggested that the timing of the trial had a bearing on defendant's decision to plead guilty. We find this argument specious as well as untenable.

We hold that he defendant's plea was completely voluntary.

Defendant's final claim of error is that the district court failed to inform him of the charge and determine that he understood it. If the plea had been

tendered prior to the start of the trial, this contention might have some merit. Here, however, defendant had been exposed to the opening statement of the prosecutor and eleven days of evidence had been presented by the Government. Although defendant stated at one point during the sentencing proceedings that he did not understand the indictment, it strains credulity for him to claim that he did not understand the nature of the charge to which he pled guilty. Defendant stresses that the court did not read the indictment to him. After eleven days of evidence, we hardly think this was necessary. At no time was it suggested that defendant lacked the mental capacity to understand what was going on. The extensive colloquy between the court and defendant during the sentencing hearing shows that he understood full

well the nature of the charges against him, particularly the conspiracy count to which he pled guilty.

There are other factors which militate strongly against withdrawal of the plea. Defendant at no time asserted flatly that he was innocent; he emphasized that no one had been hurt financially by the scheme. Our review of the trial transcript confirms the district court's finding that the evidence showed that defendant "was at the helm of the venture" and that the reason that money was not lost was "because the scheme did not succeed".

The defendant was no stranger to the federal procedures for accepting a guilty plea and sentencing. His colloquy with the court about being sentenced under Rule 20 (Fed. R. Crim. P. 20) as well as his prior record is evidence of

sophistication in these matters. In fact, the defendant's past experience with federal criminal procedure and the record in this case raise a strong inference that defendant first tried to delay the trial and then attempted to use the guilty plea process to avoid the finality of a guilty verdict and, at the same time, manufacture grounds for revoking the plea later.

It is significant that the motion to revoke the plea was not filed until the day of sentencing, eight weeks after the plea was accepted. This complies with the letter, but certainly not the spirit, of Federal Rule of Criminal Procedure 32(d).[4] As the District of Columbia

[4]Rule 32(d) provides: "A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

Circuit has pointed out, a long delay between the plea and the motion to revoke belies a claim that the plea was entered in haste and confusion and requires compelling reasons to support it. United States v. Barker, 514 F.2d at 222. We find no compelling reasons here for granting the motion to withdraw the plea and hold that the district court did not abuse its discretion in denying it.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 83-1040

UNITED STATES,
Appellee

v.

PETER F. CROSBY,
Defendant-Appellant

Before Campbell, Chief Judge,
McGowan,* Coffin, Bownes, and Breyer,
Circuit Judges,
and Skinner,** District Judge.

ORDER OF COURT

Entered: September 9, 1983

Upon consideration of "Petition for Rehearing or Rehearing En Banc", which document was submitted to the members of the panel and to the judges of the Court who are in regular active service; and

The judges of the panel having voted to deny the petition for rehearing, and the judges of the Court who are in regular active service having voted

against rehearing en banc;

It is ordered that said application for rehearing en banc is hereby denied.

By the Court:

Francis P.Scigliano
Clerk

SIX "C" INDUSTRIES INC.
Energy Investments
Suite 4-L
230 East 44th Street
New York, NY 10017
(212) 286-0246

October 30, 1982

Mr. James Crotty
Special Agent
U.S. Customs Dept.
Washington, D.C.

Re: Unlicensed arms and ammunition to be delivered by airplane in the state of North Carolina, U.S.A.

Dear Sir:

In accordance with the conversations held with the undersigned and meetings and discussions held with Major Frank Mabry, please be advised of the following:

1) I have spent, or commited to spend, approximately $80,000 on what we have code-named Guatemala, described hereafter:

A) A contract to construct and finance a roadway complex the various stages of which will run from approximately $200,000,000 to $600,000,000. This project has ben engineered and commited for by the Guatemalan legislature and approved by heads of said government. This project will be financed by the World Bank with a guarantee from the Guatemalan Central Bank.

B) Concurrent to a) above, we endeavored to obtain $20,000,000 of arms and ammunition, same to be used to defend personnel on this future road construction project. When Major Mabry checked with Robert Bl'ohm in the States Depart.

and with Mr. Clyde Bryant of U.S. Firearms Control, he learned that the arms purveyors are unlicensed. The purveyor has agreed to deliver said arms on four DC3 plane loads to Fayetteville, North Carolina, said shipment to comprise 12,000 M-16 rifles ($375 each), concussion grenades, fragmentation grenades, white phosphorus grenades, automatic pistols, silencers, mines, plus 850,000 founds of ammunition.

2) For financing the expenditures needed to result in this apprehension of these unlicensed criminal conspirators, I desire the following consideration, concerning the matter for which I am presently on trial in the Federal Court,

Boston, Massachusetts. It is important for me to note that the alleged conspiracy was a non-malicious, non-violent, situation in which no money was lost concerning the activities of a bank incorporated at St. Vincents Island in the Caribbean; the owner of same having been ignorant along with the other four defendants of certain banking law infractions.

Under Rule 20, I am willing to plead to once count as to any outstanding or contemplated indictments or criminal complaints and would consent to the following sentencing conditions:

A) Sentence -- 18 months probation plus 6 months of weekend sentence service

B) Caveat -- All of said sentence above to be suspended if Crosby's special dangerous confidential service has meritorious value to Washington, D.C.

C) Fine -- $1,000 cash

D) Consent Decree -- Won't invest in small Caribbean area offshore banks

E) Final Sentence Imposition -- During February 1983, after evaluation

F) Agreement -- In writing with Assistant U.S. Attorney and/or Judge's record

G) Judge's Chambers -- Point b) above to be described in chambers and kept confidential and sealed (go to judge)

In order to implement certain aspects of this special service for the U.S. Government, I will require the return of my passport and unlimited travel permission with the proviso that I must report once per month to Mr. Charles Prince of the U.S. Probation Department, Foley Square, South District of New York City. Please be aware of the fact that I now have a $50,000 cash bail bond posted concerning this matter.

Attached hereto are some exhibits which further describe and support the message conveyed in this letter. Later this week I will have access to approximately 60 file drawers of records held by the FBI in Boston from which certain additional exhibits covering the agreement with Guatemala will be obtained.

Please be kind enough to acknowledge receipt of this letter and attached exhibits.

In view of the extraordinary dual expenses now being financed by the undersigned, i.e. the Guatemalan project and three trial lawyers in Boston; I would appreciate an incisive, conclusive appraisal, opinion, and recommendation by November 5th.

Sincerely yours,

_____
Peter Crosby

Witnessed:

_____
L. O'Donnell

Read and approved:

_____
Frank Mabry
U.S.M.C. Retired

cc: Richard G. Stearns
Michael Fayad
Attorney General's Office,
Washington, D.C.
Judge Rya Zobel